

APR - 1 1997

BEFORE THE

COMMUNICATIONS SECTION
FEDERAL BUREAU OF INVESTIGATION

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In re Applications of)	
)	
Martin W. Hoffman, Trustee-in-Bankruptcy)	MM Docket No. 97-128
for Astroline Communications Company)	
Limited Partnership)	
)	
For Renewal of License of)	File No. BRCT-881201LG
Station WHCT-TV, Hartford, Connecticut)	
)	
and)	
)	
Shurberg Broadcasting of Hartford)	
)	
For Construction Permit for a New)	File No. BPCT-831202KF
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	
)	
TO: The Honorable John M. Frysiak		
Administrative Law Judge		

**COMMENTS IN SUPPORT OF PETITION FOR
EMERGENCY RELIEF AND STAY OF PROCEEDINGS**

Two If By Sea Broadcasting Corporation ("TIBS"), by its counsel, respectfully urges the Presiding Judge to grant the "Petition For Emergency Relief And Stay Of Proceedings" filed by Richard P. Ramirez ("Ramirez") on July 25, 1997.

Ramirez has compellingly demonstrated that the misrepresentation issue regarding Astroline Communications Company Limited Partnership ("Astroline") was designated without recognition or consideration of the fact that the matters involved in that issue have already been litigated and resolved in an extensive evidentiary trial which resulted in the determination — affirmed by the

United States Court of Appeals for the Second Circuit — that Astroline was minority controlled by *Ramirez*. To conduct a redundant hearing into those matters is wasteful and oppressive and contravenes the deference to the federal courts that full faith and credit requires. The importance of the Commission considering the related proceedings that have already been held before massive resources are dissipated fully justifies the relief Ramirez seeks. TIBS supports Ramirez' Petition in all respects.

By these Comments, TIBS seeks to focus attention on an especially critical reason why the relief that Ramirez requests should be granted. In designating the issue without recognizing the proceedings which have already been held, the Commission slipped into an arbitrary position that undercuts a vital and judicially mandated and respected policy. Grant of Ramirez' Petition will correct that error.

In the Hearing Designation Order in this proceeding, FCC 97-146, released April 28, 1997 ("HDO"), the Commission rejected TIBS' showing that the conduct of the Trustee's predecessor (Astroline) is irrelevant under the Commission's Second Thursday policy.¹ Under that policy, the Commission foregoes hearings on alleged misconduct by the licensee who preceded a trustee or receiver in bankruptcy in order to facilitate recovery by the innocent creditors of the estate. The policy has been approved and mandated by the United States Court of Appeals,² and has been applied to forego designated hearings involving grave misconduct. *See, e.g., Newsouth Broadcasting, Inc.*, 8 FCC Rcd 1272 (1993) (laundering drug money); KOZN FM Stereo 99, 6 FCC Rcd 257 (1991), 5 FCC Rcd 2849 (1990) (misrepresenting United States citizenship); Pyle Communications of

¹Second Thursday Corp., 22 FCC 2d 515, 516, recon. granted, 25 FCC 2d 112 (1970).

² LaRose v. FCC, 494 F. 2d 1145 (D.C. Cir. 1974).

Beaumont, Inc., 4 FCC Rcd 8625 (1989) (racial discrimination in employment practices); KOLA, Inc., 11 FCC Rcd 14297 (1996) (four felonies including murder).

Despite that policy, the Commission designated the issue concerning Astroline's conduct based on its perception that "the severity of the misconduct alleged by Shurberg against Astroline is such that our interest in ensuring the integrity of our processes and our minority ownership policies far outweighs our duty to minimize conflict with policies arising from the bankruptcy statutes." HDO at ¶11. Thus, based on "Shurberg's allegations and documentation in support thereof," the Commission stated that while it is sympathetic to the interests of innocent creditors, "we believe, on balance, that the preservation of the integrity of our decision making processes and minority ownership processes compels the action we take today." *Id.* Thereupon, the HDO denied relief under the Second Thursday policy that had been granted to perpetrators of other serious and disqualifying offenses.

In short, the Commission designated the issue based on a balancing of Shurberg's allegations and documentation, on one hand, against the public interest behind the Second Thursday policy, on the other hand. How different the balancing would have been, however, if the scale had included the fact that an overwhelming volume of evidence existed which led to a judicial determination, affirmed by the Court of Appeals, that Astroline was indeed minority controlled. In that case, Shurberg's allegations and documentation could not conceivably have outweighed the established public interest behind the Second Thursday policy. To reach such a ruling, one would have to conclude that allegations which already had been *disproved* in court carry more weight than judicial determinations of *actual guilt* or than documentation which establishes actual misconduct. Such a balancing test would be irrational and arbitrary.

The designation of the issue regarding Astroline's conduct places the Commission in just such an arbitrary position. Only a few weeks following the HDO, the Commission allowed another licensee, the MobileMedia Corporation ("MobileMedia"), to make a Second Thursday showing even though it admitted to having committed "unprecedented" FCC misconduct. MobileMedia Corporation, FCC 97-197, released June 6, 1997. MobileMedia on at least 289 occasions falsely notified the Commission that construction of paging stations had been completed, and on at least 94 occasions it filed defective "40-Mile Rule" applications, applying for new transmission sites within 40 miles of allegedly constructed — but actually uncompleted — sites. *Id.* at 1 (¶ 2). After designation for hearing, the Commission stayed the proceedings for 10 months to allow MobileMedia the opportunity to avail itself of Second Thursday relief. *Id.* at 6 (¶ 17).

Despite its finding that "the magnitude of the false filings at issue in this case appears to be *unprecedented*, *id.* at 6-7 (¶ 17) (emphasis added), and "the scope of the misconduct is extremely serious and the scope of wrongdoers is quite broad," *id.* at 5 (¶ 13), the Commission did *not* suggest that MobileMedia's fraud might preclude the application of Second Thursday. Rather, it found that "there is unquestionably a danger of severe harm to a multitude of innocent creditors here." *Id.* at 5 (¶ 13). Indeed, the Commission allowed MobileMedia to make a showing although it was a public company, an extension of previous cases involving only private entities. Since even MobileMedia's extremely serious and unprecedented abuse of the Commission's processes does not threaten the integrity of the Commission's processes so as to preclude Second Thursday relief, it would be inconsistent and purely arbitrary — where the courts have already adjudicated Astroline's *innocence* -- to conclude that the allegations against Astroline were somehow *more* serious. Had the Commission recognized and considered the court

proceedings and decision, it logically, necessarily, and correctly would have applied the Second Thursday policy in this case.

Moreover, even without consideration of the court proceedings and decision, the HDO's premise that the allegations concerning Astroline fall into a category of misconduct more serious than other disqualifying conduct to which the Second Thursday policy applied is inherently arbitrary. Certainly MobileMedia abused the integrity of the Commission's processes more than the allegations against Astroline, even if true, would indicate. Protecting the minority ownership policies is not a viable distinction. In Pyle Communications, *supra*, the Court of Appeals had ordered the Commission to designate a licensee's renewal applications for hearing on issues of employment discrimination against blacks. Bankruptcy proceedings were subsequently initiated and a trustee appointed. Despite the alleged violations of Commission rules and federal policy in the seminal area under the minority ownership policies, the Commission concluded that assignment of the licenses pursuant to a court-approved plan would be consistent with the Second Thursday policy.

The point is not to denigrate the importance of the minority ownership policies. But there are other policies which also have great importance, and to pick and choose among them in dispensing or denying relief is wholly arbitrary. In NewSouth Broadcasting, *supra*, for example, the principal of television and LPTV licensees had been convicted of violating federal criminal statutes by laundering money from illegal drug trafficking, and sentenced to four years imprisonment. Initially, the Commission denied a proposed transfer of the television station to a minority individual pursuant to its then distress sale policy, given the significance of the federal laws violated:

We emphasize that our decision in this case turns on the unique importance of this nation's war against drugs as reflected in the Anti-Drug Abuse Act of 1988 and other congressional and presidential actions. . . .

Order To Show Cause And Hearing Designation Order, 6 FCC Rcd 5047, 5048-49 (¶ 6) (emphasis added and footnote omitted). Despite the "unique importance" of the specific federal policy violated, however, the Commission subsequently granted an assignment of these licenses under the Second Thursday doctrine. Indeed, it did so despite the fact that one of the licensees was not in bankruptcy and that the proposed assignee was a business associate of the convicted principal.

In short even though the wrongdoer had violated Congressional policy which precluded holding any federal license, the Second Thursday doctrine applied. The Commission emphasized that the convicted principal's interest in the stations would be terminated; that the principal would, at most, receive only an incidental benefit through the elimination of potential liability in bankruptcy; and that the proceeds of the sale would benefit innocent creditors. Order, 8 FCC Rcd 1272, 1273 (¶ 5) (1993).

Similarly, in KOZN FM Stereo 99 Ltd., *supra*, the Commission had issued an order to show cause why a broadcast license should not be revoked in light of evidence that the licensee's general partner had falsified information regarding his citizenship in the license application. The misrepresentation of citizenship in KOZN is comparable to Shurberg's allegation that Astroline misrepresented its minority ownership here. In both cases, if the misrepresentation occurred and was known at the time, an initial grant could not have been made. Moreover, misrepresentation of citizenship violates statutory requirements of the Communications Act that pre-date, for example, the minority ownership policies. Nonetheless, applying settled policy, the Commission

in KOZN considered the qualifications of the trustee's predecessor to be irrelevant and twice authorized the trustee to assign the license.

In short, there is no valid basis to weigh the factors that the HDO counted against Astroline any more heavily than violations of Congressional and other vital policies which have been subject to application of the Second Thursday policy. Even without consideration of the court proceedings and decision exonerating Astroline, the HDO is arbitrary and cannot stand.

In sum, Ramirez' Petition should be granted in all respects.

Respectfully submitted,

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August 5, 1997

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary in the law firm of Fleischman and Walsh, L.L.P., hereby certify that on this 5th day of August, 1997, copies of the foregoing "Comments in Support of Petition for Emergency Relief and Stay of Proceedings" were sent by first class mail, postage prepaid, to the following:

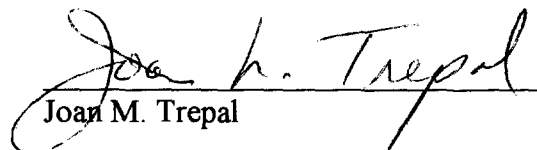
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• Hand Delivered.